

No. 14,409

In the

United States Court of Appeals

For the Ninth Circuit

CLAUDE E. SPRIGGS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona.

FILED

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**PAUL P. O'BRIEN
CLERK**

CLAUDE E. SPRIGGS
730 West Coronado Road
Phoenix, Arizona

In propria persona

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UNITED STATES OF AMERICA,

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Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona.

JURISDICTIONAL MATTERS

In the United States District Court, for the District of Arizona, Honorable Claude McColloch, United States District Judge, specially assigned, presiding:

The appellant, CLAUDE E. SPRIGGS, was, on the 12th day of April, 1954, adjudged guilty of the offense of violating Title 26, U.S.C. para. 145(b) (attempt to defeat and evade income tax) upon the indictment (TR 3, 4); and thereafter, on the 12th day of April, 1954, the appellant filed his Notice of Appeal to this Court (TR 45 thru 47) from the judgment and conviction entered on the 12th day of April, 1954, and from the order denying his Motion for Judgment of Acquit-

tal notwithstanding the Verdict, entered on the 12th day of April, 1954, and from the order denying Motion for a New Trial, denied on April 12, 1954 (TR 41-42) and from the judgment and sentencing made and entered herein on April 12, 1954 and from the whole thereof (TR 42-43).

The District Court had jurisdiction under Title 26, U.S.C. para. 145(b) (attempt to defeat and evade income tax); this Court has jurisdiction under Title 28, U. S. C., para. 1291.

STATEMENT OF THE CASE

That on the 26th day of February, 1953, the Grand Jury indicted the appellant upon one count for violation of 26 U.S.C. para. 145(b) (attempt to defeat and evade income tax) (TR 3, 4). That thereafter the Honorable Dave W. Ling specially assigned the matter to the Honorable Claude McColloch for disposition and trial. That on the 20th day of March, 1953, the appellant filed his Motion to Dismiss the Indictment, upon the ground and for the reason that the defendant had previously been acquitted and in jeopardy of conviction of the offense alleged therein, in the case of United States of America v. Claude E. Spriggs, in United States District Court for the District of Arizona, Case No. C-9558, Phoenix, and terminated on the 19th day of November, 1951, at Phoenix, Arizona, by a judgment entered and filed at Phoenix, Arizona, on November 21, 1951 (TR 4). The case lay dormant thereafter until the Honorable McColloch came to Phoenix, Arizona, for the trial of cases. That on January 7, 1954, the United States attorney Jack D. H. Hays, by and through Robert S. Murlless, assistant United States Attorney, filed an answer in opposition to a motion by the defendant to dismiss the indictment (TR 5, 6). That on the 15th day of January, 1954, the defendant filed his Plea in Bar (TR 6 thru 11). That on February 8, 1954, the

defendant was arraigned and the Court ordered that the case be continued for three days for the plea to allow defendant to file a Motion for Bill of Particulars and all motions herein were set for hearing on February 10, 1954 at 12:30 P.M. (TR 12-13). That on the 8th day of February, 1954, the defendant filed his motion for a bill of particulars (TR 11, 12). That on the 9th day of February, 1954, the United States attorney filed an answer in opposition to Motion for Bill of Particulars (TR 13 thru 16). That on the 10th day of February, 1954, a hearing was had on the defendant's Motion to Dismiss; Plea in Bar; and Motion for Bill of Particulars, and all three were by the Court denied (TR 18). That at said time the Court, from the bench stated that since the United States attorney was objecting to the furnishing of the Bill of Particulars, and since the Bill of Particulars had been furnished in the prior case (No. C-9558, Phoenix), that he would deny the defendant's Motion for Bill of Particulars and they would use the Bill of Particulars furnished in said prior trial as to Count III, as to said Bill of Particulars, the same being the same indictment now before the Court and the said Bill of Particulars as aforesaid, was used during the entire procedure of the present case. That the Bill of Particulars of the prior trial, as used in this matter, is set out (TR 16, 17) and used by the Court in the trial of this matter (TR 195, 196). That on the 10th day of February, 1954, the defendant entered a plea of not guilty (TR 18). That thereafter, on the 25th day of February, 1954, notwithstanding the denial of the plea in bar made on February 10, 1954, the United States attorney, Jack D. H. Hays, by and through Robert S. Murlless, assistant United States Attorney presented to the Court an Order which granted the defendant's plea in bar in part and denied in part in that plea in bar was granted in respect to the specific items of alleged un-reported income and

was denied with respect to the specific items of alleged fraudulent depreciation as appears in the indictment in the above entitled cause (TR 18, 19). That on the 12th day of March, 1954, the United States attorney filed his Motion of Plaintiff for re-hearing of defendant's Plea in Bar (TR 19 thru 28). That on the 22nd day of March, 1954, a hearing was had on the United States' attorneys Motion of Plaintiff for re-hearing of defendant's plea in bar and the Court ordered that the order of February 25, 1954, granting said plea in bar in part and denying said plea in part, be, and it is vacated (TR 28, 29). That on the 29th day of March, 1954, the defendant filed a Motion to Dismiss (or quash) Indictment (TR 29 thru 32). The trial began on March 31, 1954, the Court reserving its decision on defendant's motion to dismiss (or quash) indictment (TR 32). That after the United States attorney had made his opening statement, without reading the indictment to the Jury, the attorney for the defendant moved the Court to declare a mis-trial and further moved the Court to instruct the jury to return a verdict of acquittal which motions were denied (TR 59). That the trial proceeded and the United States attorney presented evidence to sustain the allegations of the indictment and presented evidence over the objection of the defendant as to the items under the Bill of Particulars of a, b, and depreciation overstated in the three matters as set out in the Bill of Particulars (TR 17). At the close of the evidence, presented by the Government, the defendant moved the Court to strike all the testimony relative to matters set forth in subdivision a and b of Count III as set forth in the Bill of Particulars in the former trial, which the Court denied (TR 229). The attorney for the defendant further moved the Court, at the end of the Government's case to dismiss the indictment upon the ground and for the reasons of res judicata, former

jeopardy, and or insufficiency of the evidence, which the Court denied (TR 230 to 232), and at the end of the whole case the attorney for the defendant renewed all the motions heretofore made at the close of the government's case, which the court denied (TR 245, 246).

The cause was submitted to the jury upon items a, b and depreciation overstated, and the jury thereafter returned a verdict of guilty (TR 37). That on the 8th day of April, 1954, the defendant filed his Motion for Judgment of acquittal notwithstanding the Verdict (TR 37, 38 and 39). That on the 8th day of April, 1954, the defendant filed his Motion for a New Trial (TR 39, 40 and 41). That on the 12th day of April, 1954, the Court denied the Motion for Judgment of Acquittal notwithstanding the Verdict and Motion for a New Trial (TR 41, 42). The appellant was on April 12, 1954 adjudged guilty of the offense of violating Title 26, Section 145(b) U. S. C. (attempt to defeat and evade income tax) as alleged and was thereafter sentenced therefor (TR 42, 43). That on the 12th day of April, 1954, the defendant filed his Notice of Appeal (TR 43, 44, 45).

The Government's case and evidence as to the depreciation overstated rested solely on the testimony of one Internal Revenue Agent, to-wit: Lloyd M. Tucker. No other evidence or Exhibits were introduced to the Jury with the exception of appellant's income tax return for the year 1947. Testimony of said agent concerning the allegations as covered by the Government's Bill of Particulars consisted solely of the following:

Depreciation overstated: "This item consists of the overstatement of depreciation by the defendant as a result of his having falsely represented the cost of his property located on Henshaw Road, Phoenix, Arizona, on which he claimed excess depreciation in the amount of \$2,978.60."

which was derived solely from admission, conversation and statements with the appellant (concerning the so-called Henshaw Road Property) (TR 180 thru 220). That the relating of statements, admissions and conversations with the appellant by the agent Lloyd Tucker, was raised by appellant by the following objections (TR 182) :

“Mr. Parker: I object. It has no proper foundation laid, and if this is leading up to something which counsel claims in the nature of a confession or something, I don’t know what it is. I object to it on the ground that the status of the record in my humble opinion does not show adequate proof of corpus delicti and doubt the ability—and this is no—

The Court: Overruled.”

There is no other evidence except as to those conversations, statements and admissions between the witness and appellant before the Court as to the aforementioned items of depreciation. The cause was thereupon submitted to the Jury.

All other evidence adduced at this trial was to items a and b of the Bill of Particulars of which the defendant had heretofore been acquitted by this United States Court of Appeals for the Ninth Circuit, in the case of *United States of America vs. Spriggs*, 198 Fed. (2) 782.

ISSUES INVOLVED

The issues involved on this appeal relating to items of capital gain and depreciation as set forth in Governments Bill of Particulars, supporting the indictment are:

1. Had the defendant been put in double jeopardy since there had been a prior acquittal upon items (a) and (b) of the Bill of Particulars?

This was raised by appellants Motion to Dismiss indictment (TR 4) and defendant’s Motion for a Mis-trial, and

defendant's Motion for a Directed Verdict (TR 59), and by defendant's Motion to Strike (TR 229); and, by reason of Motion for Judgment of Acquittal notwithstanding the Verdict.

2. Does *res judicata* apply where defendant had previously been acquitted of the same offense as in (a) and (b) of Government's Bill of Particulars?

This was raised by appellants Motion to Dismiss (or quash) indictment (TR 29 thru 32) and defendant's Motion at the end of the Government's case, (TR 230) and by reason of Motion for Judgment of Acquittal notwithstanding the Verdict.

3. May the Court, by its actions, re-indict a defendant after a plea in bar has been sustained?

This was raised by the order of the Court (TR 18, 19) and later vacated by order of the Court (TR 28, 29).

4. Is the evidence sufficient to sustain the verdict and judgment?

This was raised by appellant's objection to the evidence (TR 182) and appellant's Motion for Judgment of Acquittal (TR 230, 231 and 232), and by Motion for Judgment of Acquittal notwithstanding the Verdict (TR 37, 38 and 39).

SPECIFICATIONS OF ERROR

I.

The District Court erred in admitting testimony over the objection of appellant (TR 59) of such witnesses testimony as relating to items (a) and (b) of the Government's Bill of Particulars which related to capital gains for this testimony was inadmissible for the reason that these matters had already been adjudicated in a prior case and therefore to allow this testimony put the defendant in double jeopardy.

II.

The District Court erred in admitting the testimony, over the objection of appellant (TR 59), of such witnesses testimony as related to items (a) and (b) in the Government's Bill of Particulars, for this testimony was inadmissible, for the reason that said defendant had been tried for these offenses before and acquitted thereon and to allow such testimony is against the doctrine of *res judicata*.

III.

The District Court erred in vacating the order granting defendant in part his Plea in Bar of February 25, 1954, (TR 18, 19) by his order of March 22, 1954 (TR 28, 29), for the reason the Court has no jurisdiction to re-indict a defendant since this can only be done by a Grand Jury.

IV.

The District Court erred in admitting the testimony, over the objection of appellant, (TR 182) of such witness' testimony of related conversation, admission and statements, for said testimony was inadmissible upon the ground there had been no showing of any crime having been committed (TR 182).

V.

The District Court erred in refusing to grant appellant's Motion for Judgment of Acquittal at the end of the Government's case (TR 230 thru 232) and at the end of all the evidence adduced before the jury (TR 245, 246), upon the ground that the evidence was insufficient to sustain a conviction.

VI.

The District Court erred in refusing to grant appellant's Motion for Judgment of Acquittal notwithstanding the Verdict (TR 37, 38, 39) upon the ground that the evidence was insufficient to sustain the verdict.

VII.

The District Court erred in refusing to grant appellant's Motion for a New Trial (TR 39, 41); upon the ground that the evidence was insufficient to sustain a conviction.

ARGUMENT

I.

The District Court erred in admitting testimony over the objections of appellant of such witness' testimony as relating to items (a) and (b) of Government's Bill of Particulars which related to capital gains, for this testimony was inadmissible for the reason that these matters had already been adjudicated in a prior case and therefore to allow this testimony put the defendant in double jeopardy.

That on the 3rd day of April, 1951, in Cause No. C-9558 Phoenix, the Grand Jury indicted the defendant, Claude E. Spriggs on three Counts of tax evasion, for the years 1944, 1946 and 1947. That upon trial of the matter the defendant was acquitted on Counts I and II of the Indictment; that prior to the trial of defendant, defendant demanded and was granted a Bill of Particulars and the Bill of Particulars, as to Count III of the Indictment showed the net income for 1947 in the sum of \$7,048.95; that the Bill of Particulars further showed unreported taxable capital gains consisting of two items (a) taxable portion of profit on sale of Lots 7 and 8, Block 15, Collins Addition, Phoenix, Arizona, \$1,698.15; (b) taxable portion of profit on sale of Lot 5, Eastwood Place, Phoenix, Arizona, in the amount of \$544.64. The third portion of Count III of the indictment under the Bill of Particulars was depreciation overstated in the sum of \$2,978.60.

The present indictment and the previous indictment are for the same year, 1947, for the same amount of taxes due,

and for the same amount of income, except a difference of \$.20.

Therefore this defendant believes that the present indictment and Count III of the former indictment cover the same year, the same alleged violation and therefore a determination of the prior indictment would bar a prosecution of the present indictment, upon the ground and for the reason of double jeopardy as provided under the Fifth Amendment of the United States Constitution.

That on the 21st day of November, 1951, in Cause No. C-9558, Phoenix, a judgment was entered by the District Court of guilty and same was filed upon the 21st day of November, 1951.

Thereafter an appeal was made to the United States Court of Appeals for the Ninth Circuit and said matter was reversed and the Court therein stated:

“Upon trial, appellant was acquitted of Counts I and II upon his motion for a directed verdict of acquittal. He was also acquitted upon portions of Count III. That portion of Count III upon which appellant was found guilty is found in the allegations contained in the appellee’s response to defendant’s motion for a Bill of Particulars; ‘depreciation overstated.

This item consists of the overstatement of depreciation by the defendant as a result of his having falsely represented the loss of his property located on Henshaw Road, Phoenix, Arizona, on which he claims excessive depreciation in the amount.....\$2,978.60’ ”

U. S. vs. Spriggs, 198 Fed. (2d) 782.

That thereafter the mandate issued out of the United States Court of Appeals for the Ninth District and the same was filed and recorded upon the record of the District Court for the District of Arizona; thereafter on the 14th day of October, 1952, the United States Attorney, and

attorney for the defendant made and entered into a Stipulation wherein they said that by reason of the mandate of the appellate court, spread upon the records of the above entitled court on the 3rd day of October, 1952, the Court may by order of this Court, dismiss the action. That on the 15th day of October, 1952, the District Court for the District of Arizona, made and entered its order that the action, United States of America, plaintiff, vs. Claude E. Spriggs, defendant, Cause No. C-9558, Phoenix, is hereby dismissed * * *

This action was dismissed under Rule 48 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. Federal Rules of Criminal Procedure, page 537 under Rule No. 48 which became effective on October 20, 1949, and was in force and effect at the time this order of dismissal was made.

In the case of *United States vs. Doe*, 101 F. Supp. 609, the Court held that a dismissal of criminal prosecution can be approved by the Court only on showing that the government lacks evidence to warrant a prosecution. This case held further that Rule No. 48 of the Federal Rules of Criminal Procedure is that a judge must be convinced of public interest and that there has been a showing by the United States Attorney that he had insufficient evidence to warrant a prosecution.

The Court in the case of *State vs. Gates*, 25 NE (2) 471 states that where a defendant was discharged by reason of insufficiency of the evidence, the defendant had been put in legal jeopardy.

Rule No. 48 of the Rules of Criminal Procedure, paragraph (a) thereof, states that where the United States Attorney dismisses an action by leave of the Court the *prosecution thereupon shall terminate*. (Italics ours.)

Therefore, the prosecution under the present indictment, for the capital gains, being paragraphs (a) and (b) of the

Government's Bill of Particulars, after acquittal by the trial court in the District Court and said acquittal being affirmed by the Court of Appeals of the Ninth District, and subsequent dismissal by the District Court of the District of Arizona would certainly constitute double jeopardy as set out in the Fifth Amendment of the United States Constitution.

II.

The District Court erred in admitting the testimony over the objection of appellant of such witness' testimony as related to items (a) and (b) in the Government's Bill of Particulars, for this testimony was inadmissible for the reason that said defendant had been tried for these offenses before and acquitted thereon and to allow such testimony is against the doctrine of *res judicata*.

The doctrine and application of *res judicata* and the distinction between double jeopardy and *res judicata* are discussed in an opinion of Justice Douglas in *Sealfon vs. United States*, 332 U.S. 575; 92 L. Ed. 180. See also 147 A.L.R. 992.

In the case of *Partmar Corporation vs. Paramount Pictures Theatres Corporation* (February 8, 1954), 98 L. Ed. 301 (advance sheet No. 8, Vol. 98, L. Ed.) wherein Justice Reed speaking for the United States Supreme Court, affirmed the rule that a prior adjudication conclusively disposes of all matters which were or *might have been* litigated or adjudged therein.

The District Court for the District of Arizona and the United States Court of Appeals for the Ninth District, having determined by its decision and reversal of the prior judgment on the item of depreciation and the acquittal of items (a) and (b) of the Government's Bill of Particulars. It is inescapable that this prosecution is subject to the application of the doctrine of *res judicata*. Referring to

certain evidence which was admitted, but which the Court of Appeals failed to state whether it deemed admissible, the Court said:

“Even if the admissibility of such testimony be assumed *arguendo*, the government’s case still falls far short of establishing the guilt of appellant by the further evidence required by our decision in *Davena, Jr. v. United States*, No. 13,131, June 27, 1952, 198 Fed (2) 230.”

The Courts have held that the rule of *res judicata* applies to every question falling within the purview of the original action, in respect to matters of both claim and defense which could have been presented by the exercise of due diligence and the conclusiveness of the judgment in such case extends not only to matters actually determined but also to other matters *which could have been determined*, in the prior action. 30 Am. Jur. 923, under judgments, para. 179; 15 Am. Jur. 45, under Criminal Law, para. 367. *U. S. vs. Dockery*, 49 Fed. Supp. 907; *U. S. vs. Carlisi*, 32 Fed. Supp. 479; *U. S. vs. Oppenheimer*, 242 U.S. 85; 61 L Ed. 161; *Stone vs. U. S.*, 167 U.S. 178; 30 Am. Jur. 907, Judgments, paras. 161 to 165; 147 A.L.R. 991; *U. S. vs. Adams*, 281 U.S. 202; 74 L. Ed. 807; *Fall vs. U. S.*, 49 F. (2) 506; *res judicata* is a rule of evidence, Section 392 of the Code of Criminal Procedure.

III.

The District Court erred in vacating the order granting defendant in part his Plea in Bar of February 25, 1954, by his order of March 22, 1954, for the reason the Court had no jurisdiction to re-indict the defendant since this can only be done by the Grand Jury.

That on the 25th day of February, 1954, the United States Attorney, Jack D. H. Hays by and through Robert S. Murlless, Assistant United States Attorney, presented to the Court, in the absence of the defendant or of the defendant's attorney, an order for the Court's signature which granted the defendant's Plea in Bar in part and denied, in part, the plea in bar. This order was signed by the Court and filed in the District Court of the District of Arizona, on the 25th day of February, 1954. This order granted the defendant's plea in bar in respect to specific items of alleged unreported income and the order denied the plea in bar with respect to specific items of alleged fraudulent depreciation *as appears in the indictment* in the above entitled cause.

That thereafter, on the 22nd day of March, 1954, the Court ordered by a minute entry that the order of February 25, 1954, granting said plea in bar in part and denying said plea in part be *and it is vacated*.

Under the rules of Criminal Procedure whether you designate a motion as a plea in bar or as a motion to dismiss or by what other nomenclature you could use, the Court by its order dismissed the items (a) and (b) under the Government's Bill of Particulars. Therefore when the Court, by its order of March 22, 1954, vacated said order and reinstated the indictment had no jurisdiction to do same for the reason that a defendant can only be reindicted after a dismissal by submission of the case to the Grand Jury. Fifth Amendment of the United States Constitution. *Ex Parte Bain*, 21 Sup. Ct. Rep. 781, 121 U.S. Rep. 1.

The Court in the case of *Ex Parte Bain*, stated:

"The declaration of Article 5 of the Amendment of the Constitution that no person shall be held to answer—unless on a presentment or indictment of a grand jury—*is jurisdictional*, when this indictment is filed with the Court *no change can be made* in the body of the

instrument by order of the Court, or by the prosecuting attorney, without re-submission of the case to the Grand Jury—”.

Ex Parte Bain, supra.

IV.

The District Court erred in admitting the testimony over the objection of appellant of Government's agents related conversation, admissions and statements, for the reason that said testimony was inadmissible, upon the ground there had been no showing of any crime having been committed.

An extra-judicial confession will not be admitted unless corroborated by other evidence.

In the case of *Davena vs. United States*, 198 Fed. (2) 230 (Ninth Circuit) the Court held that to justify the admission of the confession under the rules of Court there must be some corroborating evidence to allow the confession introduced into evidence.

Tabor vs. U. S., 152 Fed. (2) 254.

In the case of *Tabor vs. U. S.*, supra, the Court said:

“It may be said that the rule in this country, in all Federal Courts which have considered the question has universally held that an extra jurisdictional confession will not be admitted unless corroborated by other evidence, the cases differ widely as to the extent of such evidence required and rules on this point have been variously stated. In most cases, it has been required that the evidence concerns the corpus delicti and some cases require that it touches every element thereof, but the diversity of these cases does not lend itself to the statement of any general rule. Only a few cases have allowed such confessions to be admitted where the extraneous proof did not definitely touch the corpus delicti and these cases may be considered somewhat ambiguous under their special facts.

There was no corroborated evidence in the present case that would justify the admission of the confession under any of the rules laid down by the various courts and the trial judge should have granted the motion for a directed verdict on the indictment. * * *”

From a careful review of the testimony adduced in this case it shows conclusively that the entire government's evidence as to the matters of overstated depreciation was predicated upon the Government's Agent, Lloyd Tucker, relating alleged confessions, admission and conversations with the appellant and no other evidence was adduced before the jury, by the Government in support of the allegations of the indictment as to the matters of depreciation as set forth in the Government's Bill of Particulars.

V.

A. The District Court erred in refusing to grant appellant's motion of acquittal at the end of the Government's case, and at the end of all the evidence adduced before the jury, upon the ground that the evidence was insufficient to sustain a conviction;

B. The District Court erred in refusing to grant appellant's motion for judgment of acquittal notwithstanding the verdict, upon the ground and for the reason that the evidence was insufficient to sustain the verdict.

C. The District Court erred in refusing to grant appellant's motion for a new trial upon the ground and for the reason that the evidence was insufficient to sustain a conviction.

(In order to save space the following statement pertains to the Assignments of Error Nos. V, VI and VII, and designated above as A, B, and C.)

The evidence is not sufficient to support the verdict and judgment of guilty of violation of Title 26, U.S.C. 145(b) (attempt to defeat and evade income tax) in the sum of \$1,058.03, as charged in the indictment herein and as limited to depreciation overstated and contained in Government's Bill of Particulars.

A careful examination of the Transcript will reveal no evidence whatsoever, or any competent testimony or other evidence of any income whatsoever received by the appellant for the year 1947 as alleged in the indictment herein.

The Government relied solely upon statements of the appellant as to depreciation taken on the property in question, to-wit: the property known as Henshaw Road property, and as set forth in Government's Bill of Particulars. The Government in the prior trial attempted to prove by financial statements the income of the appellant but at this trial the Government only put in the statements, admissions or confessions of the appellant thus putting nothing in evidence before the Court and jury except the statements of the appellant herein, uncorroborated in any manner whatsoever, and which is insufficient to sustain a conviction.

A universal and existing rule is that one may not be convicted of a crime upon his uncorroborated extra judicial confession.

Forte vs. U. S., 127 A.L.R. 1120, and annotations thereunder.

To sustain a conviction there must be *some* evidence of corpus delicti independent of alleged extra judicial confessions and admissions of the defendant.

The rule in this country in all Federal Courts which have considered the question, is that all extra judicial confessions

or admissions will not be admitted in evidence unless corroborated by other evidence.

Davena vs. U. S., 198 Fed. (2) 230;

Tabor vs. U. S., 152 Fed. (2) 254;

U. S. vs. Yost, 157 Fed. (2) 147;

Pines vs. U. S., 123 Fed. (2) 825;

Gordnier vs. U. S., 261 F. 910.

In the case of *U. S. vs. Chapman*, Seventh Circuit, 168 Fed. (2) 997, page 1001, in the latter case we said :

“Appellant contends that ‘in a “net worth case” the starting point must be based upon a solid foundation and a Revenue Agents’ statement of defendant’s oral statement or confession when uncorroborated is not sufficient to convict. We fully agree with his statement of the law.’ In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extra-judicial admission by defendant that defendant evaded some income tax.

Gleckman vs. U. S. (8th Circuit) 80 Fed. (2) 394,
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U. S. vs. Miro, (2nd Circuit) 60 Fed. (2) 58, 61;

U. S. vs. Fenwick, 177 Fed. (2) 448;

O’Brien vs. U. S., (7th Circuit) 51 Fed. (2) 193,
196.”

In *Tabor vs. U. S.*, *supra*, the Court in that case laid down the rule :

“The necessity for independent corroboration of a confession of the character of the one here or as to the admissions made after the crime is clearly recognized by the Supreme Court of the U. S. in the case of *Warszower v. U. S.*, 312 U. S. 342, 61 S. Ct. 603, 85 L. Ed. 876”

Further sustaining the law as outlined heretofore, the Court in the case of *U. S. vs. Berman*, 75 Fed. Supp. 789 observed the following:

“In the prosecution for fraudulent evasion of income tax, the government was required to prove beyond a reasonable doubt items which it claimed were properly chargeable to income construed taxable income and that failure to return them was wilful.”

The Court further found that each case must rest upon the *actual facts* and that without competent evidence to sustain the verdict, a motion for judgment of acquittal should have been granted, and that the burden rested upon the Government to prove that items charged to the defendant were in fact taxable income and must be shown by competent evidence to be such.

In consideration of all the evidence presented to the trial court, as revealed by the Transcript and the law applicable thereto and presented herein, it therefore follows that appellants conviction cannot stand under the state of the evidence adduced and the law pertaining to the subject.

It must therefore be concluded there was no evidence upon which the jury could find the appellant guilty of an attempt to defeat and evade income tax as alleged in the indictment herein.

CONCLUSION

It is respectfully submitted in view of the foregoing that this Honorable Court should reverse the judgment of the District Court and order appellant's motion of acquittal be granted, or in the alternative order that a new trial be granted.

CLAUDE E. SPRIGGS
730 West Coronado Road
Phoenix, Arizona

In propria persona

